

ASSEMBLY BILL

No. 5

**Introduced by Assembly Members Gonzalez and Kalra
(Coauthors: Assembly Members Chu and Mark Stone)**

December 5, 2016

An act to add Section 559 to the Labor Code, relating to employers.

LEGISLATIVE COUNSEL'S DIGEST

AB 5, as introduced, Gonzalez. Employers: Opportunity to Work Act.

Existing law creates the Division of Labor Standards Enforcement in the Department of Industrial Relations for the purpose of enforcing labor laws. Existing law, with certain exceptions, establishes 8 hours as a day's work and a 40-hour workweek, and requires payment of prescribed overtime compensation for additional hours worked.

This bill would create the Opportunity to Work Act. The bill would require an employer with 10 or more employees to offer additional hours of work to an existing nonexempt employee before hiring an additional employee or subcontractor, except as specified, would require an employer to post a notice of employee rights, as specified, and would require the employer to maintain certain documentation. The bill would authorize an employee to file a complaint for violation of these provisions with the division and to, in the alternative, bring a civil action for remedies under the act. The bill would require the division to enforce these provisions, as specified and would authorize the division to, among other things, adopt rules and regulations. The bill would make a violation of these provisions punishable by a civil penalty. The bill would also define various terms for these purposes.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 559 is added to the Labor Code, to read:
2 559. (a) This section shall be known, and may be cited, as the
3 Opportunity to Work Act.
4 (b) For the purposes of this section, the following terms shall
5 have the following meanings:
6 (1) “Division” shall mean the Division of Labor Standards
7 Enforcement.
8 (2) “Employee” shall mean a nonexempt employee in this state.
9 (3) “Employer” shall mean any employer with 10 or more
10 employees in this state.
11 (4) “Retaliation” shall mean any form of intimidation, threat,
12 reprisal, harassment, discrimination, or adverse employment action,
13 including discipline, discharge, suspension, transfer or assignment
14 to a lesser position in terms of job classification, job security, or
15 other condition of employment, reduction in pay or hours or denial
16 of additional hours, informing another employer that the person
17 has engaged in activities protected by this section, or reporting or
18 threatening to report the actual or suspected citizenship or
19 immigration status of an employee, former employee, or family
20 member of an employee to a federal, state, or local agency because
21 the employee or former employee exercises a right under this
22 section.
23 (5) “Shift” shall mean the consecutive hours an employer
24 requires an employee to work or to be on call to work. Breaks
25 totaling two hours or less shall not be considered an interruption
26 of consecutive hours.
27 (6) “Work schedule” shall mean all of an employee’s regular
28 and on-call shifts, including specific start and end times for each
29 shift during a consecutive seven-day period.
30 (c) An employer shall offer additional hours of work to an
31 existing employee who, in the employer’s reasonable judgment,
32 has the skills and experience to perform the work before hiring
33 any additional employees or subcontractors, including hiring an
34 additional employee or subcontractor through the use of a
35 temporary employment agency, staffing agency, or similar entity.

1 An employer shall use a transparent and nondiscriminatory process
2 to distribute the additional hours of work among existing
3 employees.

4 (d) Notwithstanding subdivision (c), an employer shall not be
5 required to offer an employee additional work hours if the employer
6 would be required to compensate the employee with overtime
7 compensation under any law or under a collective bargaining
8 agreement. This section shall not be construed to prohibit an
9 employer from offering additional work hours to an employee that
10 would result in the employer being required to compensate the
11 employee with overtime compensation.

12 (e) An employer shall retain all of the following:

13 (1) For any new hire of an employee or subcontractor,
14 documentation that the employer offered additional hours of work
15 to existing employees prior to hiring the new employee or
16 subcontractor.

17 (2) Work schedules of all employees.

18 (3) If applicable, the written statement of an employee pursuant
19 to subdivision (k).

20 (4) Any other records or documents that the division requires
21 the employer to maintain to demonstrate compliance with this
22 section.

23 (f) The division shall enforce this section and may adopt rules
24 and regulations to carry out this section. The division shall create
25 and publish a posting notice that details employees rights under
26 this section. An employer shall post the notice of employee rights
27 under this section published by the division in a conspicuous place
28 where it may be read by employees during work hours and in all
29 places where notices to employees are posted physically and
30 electronically.

31 (g) The division may issue guidelines to encourage employers
32 to create training opportunities that permit employees to perform
33 work for which the employer can be expected to have a need for
34 additional hours of work.

35 (h) An employee may file a complaint for violation of this
36 section with the division. Alternatively, an employee may bring a
37 civil action for the remedies provided by this section in a court of
38 competent jurisdiction. If the employee prevails, the court may
39 award reasonable attorney's fees. Upon the filing of a complaint
40 by an employee with the division, the Labor Commissioner shall

1 enforce this section in accordance with Chapter 4 (commencing
2 with Section 79) of Division 1, including, but not limited to,
3 Sections 92, 96.7, 98, and 98.1 to 98.8, inclusive.

4 (i) It shall be unlawful for an employer or any other party to
5 discriminate in any manner or take adverse action against any
6 employee in retaliation for exercising his or her rights under this
7 section.

8 (j) To the extent required by federal law, all or any portion of
9 the applicable requirements of this section may be waived in a
10 bona fide collective bargaining agreement provided that such
11 waiver is explicitly set forth in such agreement in clear and
12 unambiguous terms.

13 (k) This section shall apply to welfare-to-work programs under
14 which a person is required to perform work in exchange for receipt
15 of benefits, except that a participant employee in such a program
16 shall have the option to file a written statement with his or her
17 employer opting out of the requirements of this section.

18 (l) A violation of this section shall not be punished as a
19 misdemeanor pursuant to Section 553. A violation of this section
20 shall be punished by a civil penalty as determined by the division.